THE PRESIDENT OF MAJLIS PERBANDARAN TAWAU v. AMIRUDDIN RASAKE & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
VERNON ONG LAM KIAT JCA
HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEALS NO: S-01(W)-366-11-2015 & S-02(W)-1957-11-2015]
14 FEBRUARY 2017

TORT: *Negligence – Duty of care – Breach – Allegation of – Trespasser found dead in water tank causing contamination and injury to plaintiffs – Whether defendants owed duty of care to prevent action of third party – Whether there was special relationship between plaintiffs and defendants – Whether duty imposed on defendants to guard elevated water tanks from deliberate action of trespasser – Whether defendants liable for abnormal deliberate act caused by trespasser – Whether reasonably foreseeable as probable that anyone would deliberately die in elevated water tank so as to contaminate water consumed by plaintiffs – Whether defendants' liability established*

A dead person was discovered in an elevated water tank 60 feet above ground in a housing estate initiated by the Jabatan Perumahan Negara called Taman Sri Titingan ('Taman'). The plaintiffs in the suit were residents and tenants in the Taman, who sued the Local Government Authority having jurisdiction over the Taman ('the first defendant') and the second defendant who was appointed to operate and manage the Taman. The action was for damages for the tort of negligence caused by breach of duty of care by the defendants to prevent the stranger from entering or falling into the elevated water that caused damages to the plaintiffs who used and consumed the water. The High Court found that pursuant to the tenancy agreement, there existed a landlord and tenant relationship between the plaintiffs and the first defendant and that since the water tank was situated within the compound of the Taman, the first defendant *qua* landlord was under a duty of care to ensure that the area and the water supply was safe for consumption. The Judicial Commissioner ('JC') also found that the second defendant was also responsible to provide security to all public properties found within the compound of the Taman and to ensure the safety of the water tanks from any act of any person which may endanger the safety and health of the tenants of the Taman. In the circumstances, the JC found that there was a special relationship between the plaintiffs and the second defendant which gave rise to a duty on the part of the second defendant to exercise reasonable care in the discharge of its duty. As for damages, the JC held that the plaintiffs must have been psychologically affected by the discovery of the dead body especially when they have been consuming the water even after the complaint of a nauseous smell was made to the second defendant. Thus, the JC awarded nominal damages in the sum of RM3,000 to each of the plaintiffs. Thus, the two

appeals filed herein by the first and second defendants, respectively. The defendants advanced three main grounds, namely (i) whether there was no general duty of care imposed on the defendants to prevent a third party, a stranger, from causing damages to the plaintiffs by the third party's own deliberate doing; (ii) whether it was reasonably foreseeable to the defendants that the injury caused to the plaintiffs in drinking water was very likely to occur through the agency of a human being, that of a dead human being found floating on the water in the elevated water tank; and (iii) whether the JC had erroneously awarded damages of RM3,000 to each of the plaintiffs.

Held (allowing appeals)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The plaintiffs' claim for negligence was not premised on the deceased third party's illegal entry into the Taman, but it was his conduct of climbing or falling into the elevated water tank. The JC ought to have taken the initial step of determining whether the defendants owed a duty of care to the plaintiffs to prevent the autonomous action of a third party, a stranger, from climbing into or falling into the elevated water tank and allegedly contaminating the water that caused the alleged injury to the plaintiffs. This approach would be consistent with the plaintiffs' pleaded case that the defendants failed to prevent the third party deceased from entering and falling into the elevated water tank and caused the damage to the plaintiffs. The plaintiffs' pleadings failed to phrase the fundamental question of the general duty of care according to their claim in negligence which the defendants have to meet. If the JC were to have appreciated the general duty of care that the plaintiffs asserted was to be owed by the defendants to the plaintiffs in the factual context of the cause of action in negligence, he would not have erred and would have relied on the common law principles. (paras 32 & 33)

(2) There was no special relationship between the plaintiffs and the defendants to impose a duty on the defendants to guard the elevated water tanks from the deliberate action of the deceased third party, a trespasser, in climbing or falling into the elevated water tank. Those water tanks were already enclosed within a restricted area fenced with barbed wire fences. The water tanks were also sited on an elevated platform 60 feet above ground level and each water tank was 20 feet tall. Security guards were placed for the general security of the Taman. With over 500 residential units, it was reasonable to expect busy movement of people in and out of the compounds. The security guards were not placed there to guard the water tanks. The act of climbing up to and then falling into the elevated water tank was such a deliberate act that the normal measures which had been undertaken would not have prevented it from occurring. (para 36)

(3) It was not reasonably foreseeable as probable and highly unlikely that anyone would deliberately die in the elevated water tank so as to contaminate the water consumed by the plaintiffs in the Taman. Firstly, the act of the deceased third party was an abnormal act. There was no warning or even speculation that such an act might happen in all the years that the Taman existed. Secondly, the JC framed the issue of duty of care within the context of illegal entry into the water tank area and causing harm to the residents in the Taman. But the act of trespass was not the act of the third party deceased which the defendants were blamed for preventing. Since the deceased could not be identified, he was presumed to be a trespasser and the duty of care that was linked to the harm caused was the failure to prevent the trespasser from climbing into or falling into the elevated water tank and dying inside it. Thirdly, such act of the third party deceased remained a mystery. To hold the defendants liable for an abnormal deliberate act caused by an unidentified dead person, whom the defendants had no control over, was a *fortiori* not reasonably foreseeable as probable. (para 37)

(4) The plaintiffs' claim must fail because liability had not been established on the part of the defendants. In consequence, this court did not propose to deal with the issue of damages as it was rendered academic. Thus, the order of the High Court was set aside. (paras 39 & 40)

Bahasa Malaysia *Headnotes*

Satu mayat dijumpai dalam sebuah tangki air setinggi 60 kaki di sebuah estet perumahan yang dibina oleh Jabatan Perumahan Negara dipanggil Taman Sri Titingan ('Taman'). Plaintif-plaintif dalam guaman ini adalah penduduk dan penyewa rumah di dalam Taman, dan telah menyaman Kerajaan Tempatan yang mempunyai bidang kuasa atas Taman ('defendan pertama') dan defendan kedua yang dilantik untuk mengendali dan menguruskan Taman. Guaman adalah untuk ganti rugi bagi tort kecuaian yang disebabkan oleh pelanggaran kewajipan berjaga-jaga oleh defendan-defendan untuk menghalang orang asing daripada memasuki atau terjatuh ke dalam air yang membawa mudarat kepada plaintif-plaintif yang menggunakan air itu. Mahkamah Tinggi mendapati bahawa menurut perjanjian sewaan, wujud hubungan tuan tanah dan penyewa antara plaintif-plaintif dan defendan pertama dan oleh kerana tangki air ditempatkan di dalam kawasan Taman, defendan pertama sebagai tuan tanah mempunyai tanggungjawab berjaga-jaga untuk memastikan bahawa kawasan itu selamat dan bekalan airnya selamat digunakan. Pesuruhjaya Kehakiman ('PK') juga mendapati defendan kedua bertanggungjawab menyediakan sekuriti kepada semua harta benda awam yang dijumpai dalam kawasan Taman dan untuk memastikan keselamatan tangki air daripada apa-apa tindakan sesiapa sahaja yang boleh membahayakan keselamatan dan kesihatan penduduk-penduduk Taman. Dalam keadaan ini, PK mendapati terdapat hubungan khas antara plaintif-plaintif dan defendan kedua yang menimbulkan kewajipan tanggungjawab

pihak defendan kedua melaksanakan kewajipan berjaga-jaga munasabah. Bagi ganti rugi pula, PK memutuskan plaintif-plaintif pastinya terjejas secara psikologi berikutan penemuan mayat itu terutama sekali apabila mereka telah menggunakan air selepas aduan berkenaan bau busuk dibuat kepada defendan kedua. Dengan itu, PK mengawardkan ganti rugi nominal berjumlah RM3,000 kepada setiap plaintif. Oleh itu, dua rayuan ini difailkan oleh defendan pertama dan kedua masing-masing. Defendan-defendan membangkitkan tiga hujahan utama iaitu (i) sama ada tiada kewajipan berjaga-jaga secara am dikenakan terhadap defendan-defendan untuk menghalang pihak ketiga, seorang yang tidak dikenali, daripada memudaratkan plaintif-plaintif oleh perbuatan sengaja pihak ketiga; (ii) sama ada defendan-defendan boleh menjangka secara munasabah bahawa kecederaan yang dialami plaintif-plaintif apabila meminum air itu sangat berkemungkinan berlaku melalui seorang manusia, iaitu seorang manusia yang telah mati dan dijumpai terapung dalam air tangki itu; dan (iii) sama ada PK terkhilaf apabila mengawardkan ganti rugi RM3,000 kepada setiap plaintif.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Tuntutan plaintif untuk kecuaian bukan berdasarkan kemasukan secara haram si mati pihak ketiga ke dalam Taman, tetapi adalah tindakannya yang memanjat dan terjatuh ke dalam tangki air itu. PK harus mengambil langkah pertama untuk memastikan sama ada defendan-defendan mempunyai kewajipan berjaga-jaga kepada plaintif-plaintif untuk menghalang apa-apa tindakan berautonomi pihak ketiga, seorang yang tidak dikenali, daripada memanjat atau terjatuh ke dalam tangki air dan mencemarkan air yang didakwa telah memudaratkan plaintif-plaintif. Pendekatan ini konsisten dengan kes yang diplidkan oleh plaintif-plaintif bahawa defendan-defendan gagal menghalang pihak ketiga daripada memasuki atau terjatuh dalam tangki air dan memudaratkan plaintif-plaintif. Pliding plaintif-plaintif gagal menyatakan soalan asas kewajipan am berjaga-jaga menurut tuntutan kecuaian yang perlu ditangani oleh defendan-defendan. Jika PK mempertimbangkan kewajipan berjaga-jaga am yang plaintif-plaintif tegaskan terhutang oleh defendan-defendan kepada plaintif-plaintif dalam konteks fakta kausa tindakan dalam kecuaian, dia tidak akan terkhilaf dan akan merujuk kepada prinsip-prinsip common law. (perenggan 32 & 33)

(2) Tiada hubungan khas antara plaintif-plaintif dan defendan-defendan untuk mengenakan kewajipan ke atas defendan-defendan untuk menjaga tangki air daripada tindakan sengaja pihak ketiga, seorang yang tidak dikenali, memanjat atau terjatuh dalam tangki air tersebut. Tangki air itu tertutup dalam kawasan terhad dipagar dengan pagar kawat berduri. Tangki air itu juga terletak atas binaan setinggi 60 kaki atas paras tanah

dan setiap tangki air adalah setinggi 20 kaki. Pengawal keselamatan ditempatkan untuk keselamatan am Taman. Dengan terdapatnya 500 lebih unit kediaman, adalah munasabah untuk menjangkakan pergerakan sibuk orang keluar dan masuk kawasan itu. Pengawal keselamatan tidak ditempatkan untuk menjaga tangki air. Tindakan memanjat dan terjatuh ke dalam tangki air adalah tindakan sengaja yang tidak boleh dihalang oleh langkah-langkah biasa.

(3) Tidak boleh dijangka secara munasabah sebagai kemungkinan dan sangat tidak mungkin bahawa sesiapa akan, dengan sengaja, mati dalam tangki air dan mencemarkan air yang diguna oleh plaintif-plaintif dalam Taman. Pertama sekali, tindakan si mati pihak ketiga adalah tindakan yang yang tidak normal. Tiada amaran atau spekulasi bahawa perbuatan sebegitu boleh berlaku di Taman yang sudah bertahun lamanya wujud. Keduanya, PK merangka isu kewajipan berjaga-jaga dalam konteks kemasukan secara haram ke dalam kawasan tangki air dan memudaratkan penduduk-penduduk Taman. Tetapi tindakan penceroboh bukan tindakan si mati pihak ketiga yang defendan-defendan dipersalahkan mencegah. Oleh kerana si mati tidak dapat dikenal pasti, dia dianggap sebagai penceroboh dan kewajipan berjaga-jaga yang berkaitan dengan kemudaratan yang berlaku adalah kegagalan menghalang penceroboh daripada memanjat atau terjatuh ke dalam tangki air dan mati di dalamnya. Ketiga, tindakan si mati pihak ketiga itu kekal satu misteri. Untuk menyatakan bahawa defendan-defendan bertanggungjawab atas tindakan sengaja dan tidak normal oleh seorang si mati yang tidak dapat dikenal pasti, yang di luar kawalan defendan-defendan, adalah *fortiori* bukan boleh dijangkakan secara munasabah sebagai berkemungkinan.

(4) Tuntutan plaintif-plaintif harus gagal kerana liabiliti defendan-defendan tidak dibuktikan. Oleh itu, mahkamah ini tidak bercadang untuk menangani isu ganti rugi kerana sudah menjadi akademik. Perintah Mahkamah Tinggi diketepikan.

Case(s) referred to:

Chandran G Nair & Ors v. Affin Bank Bhd [2014] 8 CLJ 434 CA ***(refd)***
Donoghue v. Stevenson [1932] AC 562 ***(refd)***
Goldman v. Hargrave [1967] 1 AC 645 ***(refd)***
Government of Malaysia & Ors v. Jumat Mahmud & Anor [1977] 1 LNS 29 FC ***(refd)***
Haynes v. Harwood [1935] 1 KB 146 ***(refd)***
Home Office v. Dorset Yacht Co Ltd [1970] AC 1004 ***(refd)***
Jones v. Bartlett [2000] HCA 56 ***(refd)***
Ku Pon & Ors v. Pemandangan Sinar Sdn Bhd & Ors [2004] 3 CLJ 466 HC ***(refd)***
Lamb v. Camden London Borough Council [1981] QB 625 ***(refd)***
Lembaga Kamajuan Tanah Persekutuan v. Mariam Mangu & Ors [1984] 1 CLJ 225; [1984] 1 CLJ (Rep) 197 FC ***(refd)***
P Perl (Exporters) Ltd v. Camden London Borough Council [1984] QB 342 ***(refd)***

Puncak Niaga (M) Sdn Bhd & Anor v. Syarikat Sidhu Adek Beradek Sdn Bhd & Anor [2014] 6 CLJ 382 HC ***(refd)***
Smith v. Littlewoods Organisation Ltd [1987] 1 AC 241 ***(refd)***
Sri Inai (Pulau Pinang) Sdn Bhd v. Yong Yit Swee & Ors [2002] 4 CLJ 776 CA ***(refd)***
Stansbie v. Troman [1948] 2 KB 48 ***(refd)***
Tahan Steel Corporation Sdn Bhd v. Bank Islam Malaysia Bhd [2012] 1 CLJ 959 CA ***(refd)***
The Mediana [1900] AC 113 ***(refd)***

Other source(s) referred to:
Clerk & Lindsell on Torts, 17th edn, p 219

For the appellant - David Fung; M/s Alex Pang & Co
For the respondent - Chong Kian Ming; M/s Tan Chong & Assocs

[Editor's note: Appeal from High Court, Tawau; Suit No: TWU-22-43/9-2012 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] An identified dead person was discovered in an elevated water tank 60 feet above ground in a housing estate initiated by the Jabatan Perumahan Negara, called Taman Sri Titingan (Taman). The plaintiffs in the suit were residents and tenants in the Taman, who having used and consumed the water, sued the first defendant who is the Local Government Authority having jurisdiction over the Taman and the second defendant who was appointed to operate and manage the Taman.

[2] The action is for damages for the tort of negligence caused by breach of duty of care by the defendants to prevent the stranger from entering or falling into the elevated water tank that cause damage to the plaintiffs who used and consumed the water.

[3] After a full trial, the learned Judicial Commissioner (JC) found that there was a duty of care, breach of it, and awarded damages of RM3,000 to each plaintiff and costs of RM50,000. The two appeals filed herein are by the first and second defendants respectively. As the grounds of appeal in both appeals are similar and counsel for both appellants are one and the same, we heard both appeals together. In this judgment, the parties shall be referred to as they were in the court below.

The Salient Facts

[4] The Taman is owned by the Jabatan Perumahan Negara and under the management of the first defendant. It is a Federal project to provide homes on a rental basis to local squatters and low-income groups subject to certain

requirements set out by the Government. There were 500 units of residential flats in the Taman. Qualified tenants were offered a residential unit for rent and a tenancy agreement was then entered between the first defendant and the tenant.

[5] Pursuant to a management contract agreement dated 6 December 2007, the first defendant appointed the second defendant to discharge, operate and manage the Taman for a period of five years. The second defendant also collects monthly rentals on behalf of the first defendant and payment for water consumed by the residents of the Taman.

[6] As part of the project, an elevated water tower with water tanks in its platform and four balancing tanks on the ground was built by the Jabatan Perumahan Negara. These water tanks are the main source and supply of clean water for the consumption of the residents of the Taman.

[7] On 12 May 2012, the second defendant's worker discovered a dead body in one of the nine elevated water tanks.

Findings Of The High Court

[8] The learned JC found that pursuant to the tenancy agreement there exist a landlord and tenant relationship between the plaintiffs and the first defendant under which the first defendant *qua* landlord is obliged to take reasonable care that the plaintiffs *qua* tenants do not suffer injury (*Sri Inai (Pulau Pinang) Sdn Bhd v. Yong Yit Swee & Ors* [2002] 4 CLJ 776; [2003] 1 MLJ 273 which cited *Jones v. Bartlett* [2000] HCA 56 with approval). The learned JC further held that the first defendant *qua* local authority is duty bound to ensure the safety of the tenants especially in this case where the only source of water at the Taman comes from the elevated water tanks; in this connection, he also ruled that it is immaterial whether there is an express or implied term in the tenancy agreement specifying the duty of care owed by the first defendant to the plaintiffs. As such, the learned JC held that since the water tank is situated within the compound of the Taman, the first defendant *qua* landlord is under a duty of care to ensure that the area is safe and also that the water supply is safe for consumption.

[9] Under the management agreement, the second defendant is, *inter alia*, required to make regular inspection and maintenance of the properties, provide security guards and overall security of the Taman and to maintain and repair the water storage tanks and distribution system. The learned JC found that the second defendant was also responsible to provide security to all public properties found within the compound of the Taman and to ensure the safety of the water tanks from any act of any person which may endanger the safety and or health of the tenants of the Taman. In the circumstances, the learned JC found that there was a special relationship between the plaintiffs and the second defendant which give rise to a duty on the part of the second defendant to exercise reasonable care in the discharge of its duty.

[10] After a consideration of the conflicting evidence adduced by the plaintiffs and the defendants, the learned JC preferred the plaintiffs' version of events. He found that even though the water tank area was fenced up with an iron chain-linked fence and the entrance thereto was locked, the safety condition of the water tank area was very unsatisfactory. The fence was not high enough to prevent anyone from climbing over it and certain portions of the fencing had collapsed. The performance of the security guards was also unsatisfactory. The learned JC also found as a fact that the second defendant failed to conduct urgent and proper inspection of the water tanks after receiving complaints about the nauseous smell from the water. Consequently, the learned JC found that the plaintiffs have proven that the defendants have breached their duty of care to the plaintiffs.

[11] As for damages, the learned judge found that the plaintiffs have suffered injuries which are not too remote. He ruled that even though there was no scientific evidence to show that the water was contaminated, the plaintiffs must have been psychologically affected by the discovery of the dead body especially when they have been consuming the water even after the complaint of nauseous smell was made to the second defendant. Further, the plaintiffs would not have consumed the water for a few days after the discovery and would have had to obtain alternative sources of water from elsewhere. As such, the disruption of water supply at the Taman has affected the daily activities of the plaintiffs and they have had to endure hardship. No special damages were awarded for lack of evidential proof. Relying on the authority of *Tahan Steel Corporation Sdn Bhd v. Bank Islam Malaysia Bhd* [2012] 1 CLJ 959; [2012] 2 MLJ 314, the learned JC awarded nominal damages in the sum of RM3,000 to each of the plaintiffs.

Submission Of Parties

[12] Learned counsel for the defendants advanced three main grounds. The first ground is mounted on the proposition that there is no general duty of care imposed on the defendants to prevent a third party, a stranger, from causing damages to the plaintiffs by the third party's own deliberate wrongdoing. The learned JC erred in that, after he had accepted the legal principles laid down in *Smith v. Littlewoods Organisation Ltd* [1987] 1 AC 241, *Lamb v. Camden London Borough Council* [1981] QB 625 and *P Perl (Exporters) Ltd v. Camden London Borough Council* [1984] QB 342, he misdirected himself by failing correctly to enquire and ascertain the nature and scope of the duty of care that is alleged to be owed by the defendants to the plaintiffs on the facts or the plaintiffs' pleaded case.

[13] Learned counsel also argued that the learned JC's reliance on *Sri Inai* (*supra)* to impose the duty of care on the defendants in the fact situation is erroneous. The correct approach at first instance to the question of whether such a general duty of care would be imposed to extend the general duty in the fact situation of the present case is that taken in *Ku Pon & Ors v. Pemandangan Sinar Sdn Bhd & Ors* [2004] 3 CLJ 466.

[14] Further, the learned JC erred in law and in fact by misdirecting himself when he asked the wrong question in determining the duty of care alleged in the plaintiffs' cause of action against the second defendant as one "founded on the issue of whether it would be reasonably foreseeable that someone would have illegally entered the water tank area and causes (*sic*) harm to the resident at Taman Sri Titingan". Learned counsel argued that this is a serious error as it affects the evaluation of the law and the evidence on the question of duty of care and then on causation. The plaintiffs' claim in negligence is not premised on the deceased third party's illegal entry into the Taman, but it is his conduct of climbing or falling into the elevated water tank.

[15] The second ground is a question of mixed law and fact. Learned counsel for the defendants argued that the learned JC ought to have appreciated and properly directed himself that the duty of care is one of whether it is reasonably foreseeable to the defendants that the injury caused to the plaintiffs in drinking water is very likely to occur through the agency of a human being, that of a dead human being found floating on the water in the elevated water tank (*Smith v. Littlewoods, supra; Lamb v. Camden London Borough Council (supra*). Learned counsel cited four factors to say that it is not reasonably foreseeable as probable that anyone would deliberately die in the elevated water tanks so as to contaminate the water consumed by the plaintiffs, as such an act is not highly likely. First, the act of the third party deceased is an abnormal act. It was a freak incident that had occurred and highly unlikely to occur. Second, the act of trespass was not the act of the third party deceased for which the defendant was blamed for preventing. Third, such act of the third party deceased remained a mystery. To hold the defendants liable for an abnormal act caused by an identified dead person, whom the defendants have no control over, is not reasonably foreseeable as probable. Fourth, the learned JC's decision in finding a duty of care can be owed to prevent a highly unlikely act of an autonomous third party whom the defendants have no control over because a plaintiff might suffer harm from such an act which the defendants have failed to prevent would be to open the floodgates wide for myriad of cases which in the final analysis is unjust and against public policy.

[16] The third ground is a question of law relating to damages. Learned counsel argued that the learned JC having found that the plaintiffs had failed to prove the damages claimed and that only nominal damages can be awarded, erroneously awarded damages of RM3,000 to each of the plaintiffs as a reasonable award. The award of RM3,000 to each of the plaintiffs is not nominal but reasonable or small damages as the learned JC thinks that the plaintiffs were presumed to have suffered a certain amount of loss. Citing the House of Lords' decision in *The Mediana* [1900] AC 113, learned counsel

argued that nominal damages do not denote small damages because the person is not entitled to anything like real damage – for instance, because he has either suffered no loss or he has but failed to prove the damage although breach of right is shown.

[17] In reply, learned counsel for the plaintiffs argued that the learned JC did not commit any misdirection in law or in the appreciation of the evidence. The plaintiffs were tenants of the flats and the defendants were under a duty to take reasonable care to ensure that the plaintiffs do not suffer any injury notwithstanding the intervening act of a third party (*Sri Inai (supra); Home Office v. Dorset Yacht Co Ltd* [1970] AC 1004, [1970] 2 WLR 1140). In this case, the defendants were under a duty to keep persons out of the water tank area. The lack of precautions and measures taken by the defendants resulted in the third party deceased entering into the water tank area and dying in a water tank. The breach was foreseeable and the defendants allowed the perimeter to be breached. The damages awarded by learned JC is only nominal. Learned counsel cited *Puncak Niaga (M) Sdn Bhd & Anor v. Syarikat Sidhu Adek Beradek Sdn Bhd & Anor* [2014] 6 CLJ 382; [2015] 8 MLJ 586 and *Chandran G Nair & Ors v. Affin Bank Bhd* [2014] 8 CLJ 434; [2015] 1 MLJ 59 (CA) where nominal damages of RM50,000 was awarded in both cases.

The Common Law Position On The Tort Of Negligence

[18] In this case, the plaintiffs' action is premised on the tort of negligence. As a general rule, there are six requirements of the tort of negligence, namely: (i) the existence in law of a duty of care situation; (ii) careless behaviour by the defendant in the sense that it failed to measure up to the standard and scope set by law; (iii) a causal connection between the defendant's careless conduct and the damage; (iv) foreseeability that such conduct would have inflicted on the plaintiff the particular kind of damage of which he complains; (v) the extent of the responsibility for the damage to be apportioned to the defendant where others are also held responsible; and (vi) the monetary estimate of the extent of the damage (*Clerk & Lindsell on Torts*, 17th edn at 219).

[19] The facts in this appeal bring to the fore the question of whether there is a general duty of care imposed on the defendants to prevent a third party, a stranger, from causing damage to the plaintiffs by the third party's own deliberate wrongdoing. This question falls to be determined on a review of the established common law authorities.

[20] In *Smith v. Littlewoods Organisation Ltd (supra)* neighbouring property was also damaged by fire spreading from the defendant's property after vandals had entered. The defendant was held not liable under the property principle because they had no means of knowing of the fire risk created by third parties on their property. If the defendants had been warned by the police or others that children were continuing to enter the premises, then the

position might have been different. In that case, there are two main judgments of Lord Goff and Lord Mackay. Although their approach to the question of the general duty of care differs, the same result is achieved. Lord Mackay's judgment, marginally, may be taken as the majority judgment since the other three law lords, Lord Brandon and Lord Griffiths agreed with Lord Mackay, and Lord Keith agreed with both Lord Mackay and Lord Goff.

[21] In our view, Lord Goff's judgment elucidates the general common law applicable to this fact situation where the general principle that governs is clearly analysed: there is no general duty of care imposed on a defendant to prevent harm caused by the deliberate act of a third party, over whom the defendant has no control except in specific circumstances which he identifies. Lord Goff enunciation of the general principle of law that applies in this fact situation is at pp. 270, 271 and 272:

> Now if this proposition is understood as relating to a general duty to take reasonable care not to cause damage to premises in the neighbourhood (as I believe that the Lord President intended it to be understood) then it is unexceptionable. But it must not be overlooked that a problem arises when the pursuer is seeking to hold the defender responsible for having failed to prevent a third party from causing damage to the pursuer or his property by the third party's own deliberate wrongdoing. In such a case, it is not possible to invoke a general duty of care; for it is well recognised that there is no general duty of care to prevent third parties from causing such damage. The point is expressed very clearly in *Hart and Honoré, Causation in the Law*, 2nd edn. (1985), when the authors state, at pp. 196-197:
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> > The law might acknowledge a general principle that, whenever the harmful conduct of another is reasonably foreseeable, it is our duty to take precautions against it … But, up to now, no legal system has gone so far as this …
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> The same point is made in *Fleming, The law of Torts*, 6th edn. (1983), where it is said, at p. 200: "there is certainly no general duty to protect others against theft or loss." I wish to add that no such general duty exists even between those who are neighbours in the sense of being occupiers of adjoining premises. There is no general duty upon a householder that he should act as a watchdog, or that his house should act as a bastion, to protect his neighbour's house.
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> Why does the law not recognise a general duty of care to prevent others from suffering loss or damage caused by the deliberate wrongdoing of third parties? The fundamental reason is that the common law does not impose liability for what are pure omissions". In support of his statement, he cited the speech of Lord Diplock in *Dorset Yacht Co Ltd v. Home Office* [1970] A.C. 1004, where he said at p. 1060:
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> > The very parable of the good Samaritan which was evoked by Lord Atkin in *Donoghue v. Stevenson* illustrates, in the conduct of the priest and Levite who passed on the other side, an omission which was

> likely to have as its reasonable and probable consequence damage to the health of the victim of the thieves, but for which the priest and Levite would have incurred no civil liability in English Law.
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> Another statement of principle which has been much quoted, is the observation of Lord Sumner in *Weld-Blundell v. Stephens* [1920] A.C. 956, when he said, at p. 986: "In general … even though A is in fault, he is not responsible for injury caused to C which B, a stranger to him, deliberately chooses to do." This dictum may be read as expressing the general idea that the voluntary act of another, independent of the defender's fault, is regarded as *novus actus interveniens* which, to use the old metaphor, "breaks the chain of causation." But it also expresses a general perception that we ought not to be held responsible in law for the deliberate wrongdoing of others. Of course, if a duty of care is imposed to guard against deliberate wrongdoings of others, it can hardly be said that the harmful effects of such wrongdoings are not caused by such breach of duty. We are therefore thrown back to the duty of care. *But one thing is clear, and that is that liability in negligence for harm caused by the deliberate wrongdoing of others cannot be founded simply upon foreseeability that the pursuer will suffer loss or damage by reason of such wrongdoing. There is no such general principle*. We have therefore to identify the circumstances in which such liability may be imposed. (emphasis added)

[22] Nevertheless, Lord Goff identified the special circumstances which operate as exceptions to the general position giving rise to "narrower but still identifiable principles". Lord Goff identified four such circumstances: (i) where there is a special relationship between the defendant and plaintiff based on an assumption of responsibility by the defendant as in *Stansbie v. Troman* [1948] 2 KB 48 where such responsibility was held to arise from a contract; (ii) where there is a special relationship between the defendant and third party based on control by the defendant as in *Dorset Yacht Co Limited (supra)*; (iii) where the defendant is responsible for a state of danger which may be exploited by a third party as in *Haynes v. Harwood* [1935] 1 KB 146; and (iv) where the defendant is responsible for property which may be used by the third party to cause damage as explained by Lord Wilberforce in *Goldman v. Hargrave* [1967] 1 AC 645, 663-664).

[23] In *Lamb v. Camden London Borough Council (supra)* the defendants carelessly broke a water main outside the plaintiff's house. Escaping water undermined the foundations and caused subsidence making the house temporarily uninhabitable. Squatters moved into the house causing £30,000 worth of damage. The defendants were liable for the flood damage, but not for the damage caused by the squatters *albeit* they knew that squatting was rife in that part of London. That was a risk against which the plaintiff could have insured, or taken more efforts to protect himself. The defendants had no right to enter and secure the building. Both Lord Denning and Watkin LJ held that the subsequent damage was too remote.

[24] Accordingly, insofar as the common law is concerned, the position is quite settled. Whilst as a general rule, no liability attaches to a defendant for actions or omissions of a third party, certain fact situations may give rise to exceptions to this general rule.

Decision

[25] In the light of the settled law that there is no general duty imposed on the defendants to prevent a third party from causing damage to the plaintiffs by the third party's own deliberate wrongdoing, the proper course for a trial judge would be to enquire and ascertain the nature and scope of the duty of care that is alleged to be owed by the defendants to the plaintiffs on the facts of the plaintiffs' pleaded case. In conducting his enquiry, the trial judge should consider whether on the facts as disclosed in the evidence, there are any special circumstances in which the defendants may be held responsible in law for the damage suffered by the plaintiffs through the deliberate wrongdoing of the deceased third party.

[26] In this instance, the learned JC had posed the question as "… whether it would be reasonably foreseeable that someone would have illegally entered the water tank area and causes *(sic)* harm to the resident *(sic)* at Taman Sri Titingan." In reliance on *Sri Inai (supra)* the learned JC found that there was a duty of care on the defendants in the fact situation of the present case. In our view, this is a misdirection in law and in fact. For the plaintiffs' claim for damages in negligence is not premised on the deceased third party's illegal entry into the Taman, but it is his conduct of climbing or falling into the elevated water tank. The learned JC ought to have enquired and ascertained the nature and scope of the duty of care that is alleged to be owed by the defendants to the plaintiffs on the basis of the plaintiffs' pleaded case.

[27] In *Sri Inai (supra)*, the first defendant (a school) rented an old dwelling house from the second defendant (a local authority) for use as a hostel to accommodate some of its students. The second defendant despite knowing that young children would live in the old house, did nothing to upgrade the building to ensure that it was safe for use as a hostel by young children. Subsequently, a fire broke out in the house claiming the lives of several children and causing serious injuries to others. The Sessions Court Judge found both defendants equally liable for the death and injuries caused by the fire. On appeal, the High Court held that the second defendant whether as landlord or local authority owed no duty of care to the plaintiffs. On appeal, the Court of Appeal set aside the order of the High Court and restored the order of the Sessions Court.

[28] The Court of Appeal in *Sri Inai (supra)* laid down the principle that a general duty of care is owed by the landlord to its tenants to ensure that the building rented out is in a condition that is safe from fire hazard regardless of the pre-existing contractual duty of the landlord and tenant that governs

their relationship. This is based on the Atkinian duty-of-care elaboration in *Donoghue v. Stevenson* [1932] AC 562, which seminal proposition of the law of negligence in tort was accepted by the Federal Court in *Lembaga Kamajuan Tanah Persekutuan v. Mariam Mangu & Ors* [1984] 1 CLJ 225; [1984] 1 CLJ (Rep) 197; [1984] 1 MLJ 283. The general duty of care in the tort of negligence owed by the landlord to the tenant is extended to the lawful visitors of the tenant because of the proximity of the relationship and reasonable foreseeability to the visitors.

[29] *Sri Inai (supra)* is also a confirmation of the general duty of care owed by teachers of a school to students under their care and supervision because of the special relationship between them (see *Government of Malaysia & Ors v. Jumat Mahmud & Anor* [1977] 1 LNS 29; [1977] 2 MLJ 103). In *Sri Inai (supra)* the first defendant a private school owed a general duty of care to its resident students who were harmed by the fire which broke out in the old building that was not upgraded to ensure it was safe for use as a hostel by young children. So it was that the Court of Appeal in *Sri Inai (supra)* was able to decide and conclude at p. 789 (CLJ); p. 288 (MLJ):

> It follows that we are not, in the present instance, extending the law of negligence into a new field. We are not even making an incremental advance. All that is required of us here is a straightforward application of *Donoghue v. Stevenson*. The ground for this is, as we have already said, established by *Lembaga Kamajuan Tanah Persekutuan v. Mariam*."

[30] In *Ku Pon v. Pemandangan Sinar Sdn Bhd (supra)* the plaintiffs, family members of kidnapped victims claimed damages in negligence and defamation against the proprietor of a local Chinese newspaper and its editor and scriptwriter for publication in the newspaper of the incident of kidnap and that a large ransom had been paid by a rich businessman. The plaintiffs alleged that the publication meant for the public had created a special relationship which meant the defendants were responsible for the safety of the plaintiffs. This duty was breached by the inaccurate published article. Consequently, the kidnappers demanded an additional amount as ransom, which the plaintiffs were unable to raise, and the kidnappers refused to negotiate further resulting in the victims being still detained.

[31] In striking out the claim, Suriyadi J (later FCJ) took the approach of first determining whether, on a given set of facts, a notional duty of care could be identified, failing which the matter ends. At p. 476 (CLJ); p. 476 (MLJ), His Lordship said:

> So, should I expand the scope to accommodate the plaintiffs' claim? To take that drastic step, I need to conclude whether, on the given set of facts, a notional duty of care could be identified, failing which the matter ends. If I were to conclude otherwise, the next step naturally would be to determine whether a factual duty of care existed between the plaintiffs and the defendants at the hearing proper stage. Needless to say, *whether the pleaded set of facts disclose the existence of notional duty of care, would very much*

> *depend on the foreseeability of damages to the plaintiffs, the relationship of proximity or neighbourhood notion, and that it is fair and reasonable to impose a duty of care.* To reiterate only after these ingredients have been satisfied will a notional duty of care may *(sic)* arise. (emphasis added)

[32] In our respectful view, the approach taken by Suriyadi J is the correct approach. The learned JC ought to have taken the initial step of determining whether the defendants owed a duty of care to the plaintiffs to prevent the autonomous action of a third party, a stranger, from climbing into or falling into the elevated water tank and allegedly contaminating the water that caused the alleged injury to the plaintiffs. This approach would be consistent with the plaintiffs' pleaded case that the defendants failed to prevent the third party deceased from entering and falling into the elevated water tank and caused the damage to the plaintiffs.

[33] We also agree with learned counsel for the defendants that the plaintiffs' pleadings failed to phrase the fundamental question of the general duty of care according to their claim in negligence which the defendants have to meet. If the learned JC were to have appreciated the general duty of care that the plaintiffs asserted was to be owed by the defendants to the plaintiffs in the factual context of the cause of action in negligence, he would not have erred and would have relied on the common law principles enunciated above.

[34] In *Sri Inai (supra)* Gopal Sri Ram JCA (later FCJ) recognised that the law governing the tort of negligence does not, as a general rule, impose liability for pure omissions. He adverted to one exception to the general rule where a defendant creates a danger eg, by leaving an unlit vehicle on the highway would be under a duty to warn others of the danger he has created.

[35] Linked to the requirement of special circumstances is the question of whether in all the circumstances it was reasonably foreseeable to the defendants that the injury caused to the plaintiffs in using the water is very likely to occur through the agency of a human being who chose to or was placed there in the elevated water tank. In the majority judgment of *Smith v. Littlewoods*, *supra*, Lord Mackay expressed the test in the following manner at pp. 257, 258 and 261:

> In approaching these rival submissions it has to be borne in mind that the damage to the neighbouring properties, upon which the claims against Littlewoods are founded, is damage by fire or otherwise resulting from vandalism in Littlewood's premises. A duty of care to prevent this damage is the only duty alleged to be incumbent upon Littlewoods relevant to this case. From this it follows that unless Littlewoods were bound reasonably to anticipate and guard against this danger, they had no duty of care, relevant to this case, requiring them to inspect their premises. …. In my opinion, their Lordships of the First Division applied their minds to the correct question. In my opinion, the question, whether, in all the circumstances described in evidence, a reasonable person in the position

> of Littlewoods was bound to anticipate as probable, if he took no action to keep the premises lockfast, that, in a comparatively short time before the premises were demolished, they would be set on fire with consequent risk to the neighbouring properties is a matter for the judges of fact to determine. Once it has been determined on the correct basis, an appellate court should be slow to interfere with the determination: see, for example, Lord Thankerton in *Muir v. Glasgow Corporation*, 1943 S.C. (H.L) 3, 8, and Lord Porter in *Bolton v. Stone* [1951] A.C. 850, 860.
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> It is true, as has been pointed out by Oliver L.J in *Lamb v. Camden London Borough Council* [1981] Q.B. 625, 642, that human conduct is particularly unpredictable and that every society will have a sprinkling of people who behave most abnormally. The result of this consideration, in my opinion, is that where the only possible source of the type of damage or injury which is in question is agency of a human being for whom the person against whom the claim is made has no responsibility, it may not be easy to find that as a reasonable person he was bound to anticipate that type of damage as a consequence of his act or omission. *The more unpredictable the conduct in question, the less easy to affirm that any particular result from it is probable and in many circumstances the only way in which a judge could properly be persuaded to come to the conclusion that the result was not only possible but reasonably foreseeable as probable would be to convince him that, in the circumstances, it was highly likely*. (emphasis added)

[36] In all the circumstances, we do not consider that there is any special relationship between the plaintiffs and the defendants to impose a duty on the defendants to guard the elevated water tanks from the deliberate action of the deceased third party, a trespasser, in climbing or falling into the elevated water tank. Those water tanks are already enclosed within a restricted area fenced with barbed wire fences. Secondly, the water tanks are sited on an elevated platform 60 feet above ground level and each water tank is 20 feet tall. Thirdly, the security guards are placed for the general security of the Taman. With over 500 residential units, it would be reasonable to expect busy movement of people in and out of the compounds. The security guards are not placed there to guard the water tanks. Fourthly, because the act of climbing up to and then falling into the elevated water tank is such a deliberate act that the normal measures which have been undertaken would not have prevented it from occurring.

[37] We also take the view that in all the circumstances it is not reasonably foreseeable as probable and highly unlikely that anyone would deliberately die in the elevated water tank so as to contaminate the water consumed by the plaintiffs in the Taman. First, the act of the deceased third party is an abnormal act. It was a freak incident that had occurred and it was highly unlikely to occur. There was no warning or even speculation that such an act might happen in all the years that the Taman existed. Second, the learned JC framed the issue of duty of care within the context of illegal entry into the

water tank area and causing harm to the residents in the Taman. But the act of trespass was not the act of the third party deceased which the defendants were blamed for preventing. Since the deceased could not be identified, he was presumed to be a trespasser and the duty of care that was linked to the harm caused was the failure to prevent the trespasser from climbing into or falling into the elevated water tank and dying inside it. Third, such act of the third party deceased remained a mystery. No one knows how or why he died in the elevated water tank. To hold the defendants liable for an abnormal deliberate act caused by an unidentified dead person, whom the defendants have no control over, is *a fortiori* not reasonably foreseeable as probable. Fourth, if the duty of care is owed in this fact situation because the trespasser's act and the ultimate harm is foreseeable, then many other acts of autonomous human beings would be similarly actionable, including criminal acts in a housing estate such as theft, assault or even kidnapping because the defendant failed to prevent such actions. By analogy, the extension of the tort of negligence in this area would have serious implications. It would cover a claim by a tenant of a shopping mall or office block against the landlord or operator in the breach of duty to take care in failing to prevent all types of incidents caused by human beings who used the mall or office block. If the deliberate act of a suicide occurred there, whether that of a resident, invitee or trespasser, and the tenants there suffered mental distress and loss of business, they too would have an actionable case, despite the crucial fact that such acts are the result of the deliberate act of an independent person whom the defendant has no control over.

[38] We would therefore associate ourselves with the sentiments expressed by the learned judge in *Ku Pon (supra)* where he found that it was against public policy to extend the law to new areas of claims and which also did not satisfy the considerations of whether it was fair, just and reasonable to do so.

[39] In conclusion, we reiterate there is no general duty of care imposed on a defendant to prevent harm caused by the deliberate act of a third party, over whom the defendant has no control except in specific circumstances which he identifies. No special circumstances have been made out on the facts as disclosed in the evidence and on the plaintiffs' pleaded case to warrant extending the general duty of care on the defendants. Lastly, the fact that anyone would deliberately die in the elevated water tank so as to contaminate the water consumed by the plaintiffs in the Taman is an event which is not reasonably foreseeable as probable and highly unlikely. Consequently, the plaintiffs' claim must fail because liability has not been established on the part of the defendants. In consequence, we do not propose to deal with the issue of damages as it is rendered academic.

[40] By reason of the foregoing, we are constrained to set aside the order of the High Court and allow both the appeals. However, in view of the rather unusual set of circumstances which gave rise to the suit in the court below, we make no order as to costs. We also order the deposits to be refunded to both the defendants.

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